IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1587 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NOORMAHMMAD ADAMBHAI MEMON - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR RAJESH M AGRAWAL for Appellant(s) : 1,
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 23/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 15.4.2005 rendered in Special (NDPS) Case No.4 of 2002 by the learned Additional Sessions Judge, Fast Track Court, Nadiad, by which the appellant ('the accused' for short) has been convicted for commission of the offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and sentenced to suffer RI for ten years and fine of Rs.1,00,000/- i.d., RI for further period of two years.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under:

2.1. P.W.1, Vishrambhai Dhanjibhai Khardai, P.I. LCB, Anand, when he was on duty on 27.8.2002 received a secret information from the informant that at Kadiavad, Umreth, a person named Noormahmmad Adambhai Memon (the accused), is possessing Heroin (popularly known as 'brown sugar') and he sells the same. The said information was recorded in the register kept for the said purpose and he called for two panchas and on arrival of panchas, he conveyed the said secret information to the panchas and also to the police personnels and accordingly the preliminary panchnama was prepared.

2.2. Thereafter, V.D. Kharadi, PI, along with the panchas and N.V. Patel, PSI Umreth Police Station and other police personnels went to Kadiavad, Umreth. On reaching Kadiavad, VD Kharadi found one person standing in the gallery and he intercepted him. He asked the said person, who was standing in the gallery, his name to which he replied that he is Noormahmmad Adambhai

Memon ('the accused'). VD Kharadi informed the accused about the secret information received by him. The accused was informed that he is a gazetted officer and he is empowered to search the person of the accused. However, if the accused desires that he shall be searched by another gazetted officer or an Executive Magistrate, he will make arrangement for the same. However, the accused opted that P.W.1 may search him. Accordingly, P.W.1 searched the accused in presence of the panchas and other police personnels. During the search of the person of the accused, from the pocket of the pant of the accused, 97 small packets, in all containing 11 grams and 290 milligrams heroin was found. The same was seized and the accused was arrested and arrest memo was given to him. Samples were taken from the article seized from the accused. After completing formalities of seizure, sealing and arrest of the accused, the second part of the panchnama was completed.

2.3. A complaint in respect of the aforesaid incident was given by P.W.1, VD Kharadi, at Umreth Police station vide CR No.II-3085 of 2002 against the accused for commission of the offence under section 22 of the NDPS Act.

2.4. On registration of the complaint, investigation was put into motion. P.W.9, Nileshkumar Vithalbhai Patel, recorded the statement of witnesses and sent samples of the contraband article for analysis to FSL Ahmedabad. On receipt of the report from FSL Ahmedabad certifying that the article sent for analysis was heroin and as incriminating evidence was found against the accused, the accused was charge-sheeted for commission of offence under Section 22 of the NDPS Act before the Special Court (NDPS) Nadiad.

2.5. The learned Additional Sessions Judge, Fast Track Court, Nadiad to whom the case was made over for trial, framed charge against the

accused for commission of the offence punishable under Section 22 of the NDPS Act. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried and thereupon he was put to trial by the learned Additional Sessions Judge, Fast Track Court, Nadiad in Special (NDPS) Case No.4 of 2002.

2.6. To prove the culpability of the accused, the prosecution has examined in all 9 witnesses and relied upon their oral testimonies, the details of which have been given in para 3 of the impugned judgment and order.

2.7 In order to prove the charge levelled against the accused, the prosecution has also produced in all 21 documents and relied upon the contents thereof, the details of which have also been narrated in paragraph 4 of the impugned judgment and order.

2.8. After recording of the evidence of the prosecution witnesses was over, the trial Court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution in toto. He stated that he has been falsely implicated in the case. He has not committed any offence. However, he has neither led any evidence nor examined any witness to support his defence.

2.9. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that it is proved by the prosecution beyond reasonable doubt that when the accused was intercepted and apprehended, 11 grams and 290 milligrams of heroin was recovered from the pocket of the pant of the accused in 97 small packets. Therefore, complicity of the accused for commission of the offence under the NDPS Act, has been proved and hence the accused has been

convicted for commission of the offence punishable under section 22 of the NDPS Act and imposed sentence on him to which reference is made in earlier paragraph of this judgment giving rise to this appeal, at the instance of the accused.

3. Mr. Rajesh M. Agrawal, learned advocate for the accused, at the outset, submitted that he does not challenge the order of conviction on merits. However, he challenges the order of sentence. According to him, the contraband article heroin which was recovered from the accused was less than commercial quantity. He submitted that from the accused, heroin weighing 11 grams 290 milligrams was recovered. However, the trial court imposed the maximum sentence of ten years and, therefore, the sentence imposed on the accused is disproportionate to the guilt of the accused. He also submitted that the accused has undergone more than 4 years of imprisonment. Therefore, while upholding the conviction, sentence may be reduced to the extent he has

undergone and accordingly the appeal may be allowed qua sentence only.

4. Mr. KT Dave, learned APP for the respondent - State of Gujarat, has candidly submitted that it is true that the quantity of heroin recovered from the accused is 11 grams and 290 milligrams. As per notification dated 19.10.2001, at Item No.56, small quantity and commercial quantity of heroin is mentioned as 5 grams is a small quantity whereas 250 grams of heroin is a commercial quantity. So far as the accused is concerned, 11 grams and 290 milligrams of heroin was recovered from him. He, therefore, submitted that appropriate order giving benefit of rationalized sentence structure as per the NDPS (Amendment) Act, 2001 may be passed against him. Therefore he urged to pass appropriate order.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This court has undertaken a complete and comprehensive appreciation of all vital features

of the case and the entire evidence on record which is read and re-read by the learned advocates appearing for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. Since Mr. Rajesh Agrawal, learned advocate for the accused, has not challenged the order of conviction recorded against the accused on merits, this Court has to examine the sole contention as to whether the trial Court has rightly sentenced the accused, under Section 22 of the NDPS Act i.e., sentenced the accused considering the quantity of the contraband article heroin recovered from the accused,

weighing 11 grams and 290 milligrams.

7. At the outset be it noted that the NDPS Act, 1985 as amended by NDPS (Amendment) Act, 2001 is amended with a view to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. The statement of objects and reasons of the NDPS (Amendment) Act, 2001 is that Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend upto twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions

of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalization of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

8. There is no dispute that from the accused, quantity of 11 grams and 290 milligrams of heroin was recovered, which is admittedly not a commercial quantity and also not a small quantity. As per the notification - SO 1055 (E) dated 19.10.2001, at Serial No.56, the quantity of 5 grams of heroin is a small quantity whereas quantity of 250 grams of heroin is a commercial quantity. Therefore, it cannot be

disputed that the quantity of 11 grams and 290 milligrams of heroin found from the accused was neither a small quantity nor a commercial quantity. Therefore, trial Court ought to have convicted and sentenced the accused under Section 22 (b) of the NDPS Act taking into consideration the rationalized sentence structure. However, the trial Court, without considering this aspect, has imposed sentence of RI for ten years, which is the maximum sentence, which according to us, is disproportionate to the quantity found from the accused. Recovery of contraband article heroin weighing 5 grams and 001 milligrams to 249.999 milligrams of heroin would invite punishment under section 22 (b) of the NDPS Act as the quantity is lesser than the commercial quantity but greater than small quantity and the punishment can be RI for a term which may extend to ten years, and with fine which may extend to one lakh rupees. In instant case, the quantity of contraband article heroin recovered from the accused is 11 grams and 290 milligrams. In these circumstances, the rationalized sentence

structure is required to be considered. Therefore, according to this court, the punishment imposed on the accused is disproportionate to the quantity of contraband article recovered from him. Therefore, according to us, the trial court has committed a serious error in not considering the objects and reasons of rationalized sentence structure in its proper perspective. In aforesaid view of the matter, according to us, if the accused is sentenced to suffer RI for four years and fine of Rs.50,000/- i.d., RI for further period of six months, it would meet the ends of justice.

9. Seen in the above context, the appeal deserves to be allowed partly qua sentence only by reducing the sentence as mentioned in the earlier paragraph.

10. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. While upholding the order of conviction recorded against the accused for commission of offences under Section 22(b) of the NDPS Act, the

sentence is altered by reducing the same and accordingly the accused is sentenced to suffer RI for 4 years and fine of Rs.50,000/- and i.d., to undergo RI for further period of six months.

11. Mr. Rajesh Agrawal, learned advocate for the accused, states that since the accused has undergone total period of sentence of more than four years and six months, appropriate order, directing the jail authorities to release the accused may be passed.

12. Mr. K.T. Dave, learned APP for the respondent – State of Gujarat, on the basis of the jail remark sheet, endorsed by saying that the accused has undergone total period of sentence of 4 years 6 months and 9 days so far.

13. In view of the statement made by Mr. Rajesh Agrawal, learned advocate for the accused, which is endorsed by Mr. K.T. Dave, learned APP for the respondent – State of Gujarat, at the bar and as per the jail remark sheet, since the accused has undergone total period of sentence of 4 years 6

months and 9 days, jail authorities are directed to set the accused at liberty forthwith, if his presence is not required in connection with any other case.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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